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No. _____

**In the Supreme Court
of the United States**

OCTOBER TERM, 1983

OREGON-WASHINGTON CARPENTERS-
EMPLOYERS PENSION TRUST FUND,

Appellant,

v.

R. A. GRAY & COMPANY

Appellee.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**JURISDICTIONAL STATEMENT
OF OREGON-WASHINGTON CARPENTERS-EMPLOYERS
PENSION TRUST FUND**

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QUESTION PRESENTED

Whether in enacting the Multiemployer Pension Plan Amendments Act of 1980, Congress had the power to provide that the enactment take effect on a prior date so as to prevent frustration of the purposes of the enactment.

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**OPINIONS BELOW
JURISDICTION
CONSTITUTIONAL AND STATUTORY PROVISIONS
STATEMENT OF THE CASE**

Appellant Oregon-Washington Carpenters-Em-
ployers Pension Trust Fund ("Trust Fund") joins
in the above listed portions of the jurisdictional

statement of appellant Pension Benefit Guaranty Corporation ("PBGC"), which has been filed in this Court.

THE ISSUE IS SUBSTANTIAL

The Trust Fund joins also in the PBGC statement of the substantiality of the issue presented on appeal. In addition, the Trust Fund supplements that statement with the following presentation of reasons.

The Ninth Circuit Court of Appeals has declared unconstitutional the Multiemployer Pension Plan Amendments Act of 1980 ("Act") insofar as the Act imposed withdrawal liability on an employer who withdrew from a multiemployer pension plan before the Act became law. The lower court, however, erred in concluding that the retrospective application of the Act violates the right of appellee to due process under the Fifth Amendment. The test applied by the Court of Appeals, and the conclusion it reached, both disagree fundamentally with the teachings of this Court. The Court, therefore, may summarily reverse the Court of Appeals. Alternatively, in light of the substantial, legitimate governmental interests served by the Act, the Court should note probable jurisdiction to "review the exercise of the grave power of annulling an Act of Congress." *United States v. Gainey*, 380 U.S. 63, 65 (1965).

1. The 1980 Act carries a strong presumption of constitutionality.

In 1974, pursuant to powers delegated by the Con-

stitution,¹ Congress enacted the Employee Retirement Income Security Act ("ERISA"), 88 Stat. 829 (1974) (codified at 29 U.S.C. §§ 1001-1461 (1976)). In 1980, pursuant to the same authority, Congress amended ERISA with the Act, 94 Stat. 1208 (1980) (codified at 29 U.S.C. §§ 1001a-1461 (Supp. V. 1981)).

Acts of Congress, especially "Acts adjusting the burdens and benefits of economic life * * *," *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976), carry a weighty presumption of constitutionality. Concededly, the present case involves the retrospective application of congressional legislation. However, although it may not be true that in every case "what Congress can legislate prospectively it can legislate retrospectively," *id.* at 16, nonetheless, where Congress already has regulated in a field, Congress may alter its regulations with retrospective effect in order to cure a perceived defect in the regulatory scheme. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978); *Veix v. Sixth Ward Building & Loan Association*, 310 U.S. 32 (1940). With the Act, Congress addressed its concern that provisions of ERISA

¹ The declaration of congressional policy embodied in ERISA, 29 U.S.C. § 1001, speaks to "the well-being and security of millions of employees and their dependents." The declaration states, "it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce," that pension plan safeguards be established. Congress further finds that pension plans "substantially affect the revenues of the United States" and declares the policy of ERISA to include protection of "the Federal taxing power." In its declaration, then, Congress has called up the general welfare, commerce and taxing powers delegated to it by Article I, Section 8 of the Constitution.

which imposed only contingent liability on employers upon withdrawal from a multiemployer pension plan encouraged such withdrawals to the detriment of the purposes of ERISA. The Act thus represents curative legislation directed upon a regulatory scheme which concerns "the burdens and benefits of economic life." In this case, therefore, the presumption is especially strong that the interests served by congressional legislation outweigh the possibility of undesirable consequences which might result from the retrospective effect of the legislation.

2. This Court's test for constitutionality, where deprivation of due process by statute is claimed, focuses on whether Congress acted arbitrarily and irrationally.

A court sitting in review of an act of Congress does not exercise independent legislative judgment. Rather, when a party claims that the retrospective effect of a statute has violated his due process right, proper judicial inquiry focuses narrowly upon whether "the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn, supra*, 428 U.S. at 15. In this instance, providing for the retrospective application of the Act was a reasonable attempt to maintain the status quo so that the Act could have its intended remedial effect. The Act may operate inequitably in certain circumstances. It is, however, the very essence of the rule of law that rules adopted for the good of the many may have unfortunate consequences in particular instances. In any case, the Constitution does not require "that legisla-

tion on economic matters be compatible with * * * normal fairness." *Usery v. Turner Elkhorn, supra*, 428 U.S. at 44 (Powell, J., concurring).

3. The court below applied an incorrect test in assessing the constitutionality of the 1980 Act.

The Ninth Circuit Court of Appeals applied an incorrect and inappropriate test in assessing the constitutionality of the Act. The court adopted an approach used by the Seventh Circuit Court of Appeals in *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 592 F.2d 947 (7th Cir. 1979), *aff'd on other grounds*, 446 U.S. 359,² *reh'g denied*, 448 U.S. 908 (1980). In its review, the Ninth Circuit Court of Appeals examined four factors for the purpose of determining whether the retrospective feature of the Act was constitutional.³ Plainly the court's approach amounted to an effort to evaluate the wisdom of the particular form of legislative relief chosen by Congress. Such an attempt to assess the fit of means to ends was misguided, however, for the "selection of means to

² In *Nachman*, the Seventh Circuit Court of Appeals first held the challenged portions of ERISA to be constitutional, and second construed the statute unfavorably to the employer. The employer petitioned for certiorari on both the constitutional and interpretive questions. This Court granted certiorari, but only as to the interpretive question. 446 U.S. at 368.

³ The factors were: "(1) the reliance interests of the parties affected; (2) whether impairment of the private interest is effected in an area previously subjected to regulatory control; (3) the equities of imposing the legislative burdens; and (4) the inclusion of statutory provisions designed to limit and moderate the impact of the burdens." *Shelter Framing Corp. v. Pension Ben. Guar. Corp.*, 705 F.2d 1502, 1511 (9th Cir. 1983).

pursue a general end typically involves accommodation of subsidiary ends" which may or may not be apparent. Note, Process-Oriented Approach to the Contract Clause, 89 Yale L.J. 1623, 1633 n.52 (1980). See also, Linde, Due Process of Lawmaking, 55 Neb. L. Rev. 197, 220 (1976).

Moreover, this Court has made clear that the proper role of a reviewing court is not "to assess the wisdom of Congress' chosen scheme" of legislation. *Usery v. Turner Elkhorn*, supra, 428 U.S. 18-19; *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). As in *Usery*, so also in the instant case, whether a somewhat different legislative response to a particular problem "would have been wiser or more practical under the circumstances is not a question of constitutional dimension." *Id.* at 19; citations omitted.⁴

In sum, once the proper test is applied and it is recognized that the record does not support a conclusion that Congress "has acted in an arbitrary and

⁴ The Ninth Circuit Court of Appeals also relied on *Railroad Retirement Board v. Alton Railroad*, 295 U.S. 330 (1935) and *Allied Structural Steel Co. v. Spannaus*, supra. *Alton*, although never explicitly overruled, is, of course, an echo from another era. "Assuming," as the *Usery* Court put it, that that portion of *Alton* which invalidated the Railroad Retirement Act of 1934 "retains vitality," 428 U.S. at 19, this Court, as that in *Usery*, should "find [*Alton*] distinguishable" from the case at bar.

Allied was decided under the contract clause, which is not applicable to the Act. In addition, the *Allied* Court stressed that the legislation applied to an area not previously regulated by the state whereas the Act amends an existing regulatory scheme. Furthermore, in *Allied*, the Court found that the Minnesota law at issue was not directed at a broad societal interest, unlike the amendments to ERISA.

irrational way," the result is easily reached that the Act does not infringe on appellee's right to due process.

CONCLUSION

For the reasons stated above and in the jurisdictional statement of the PBGC in this appeal, this Court should summarily reverse the decision of the lower court or, in the alternative, note probable jurisdiction.

Respectfully submitted,

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August 19, 1983

APPENDIX

For copies of the opinions and judgments of the United States District Court and the United States Court of Appeals in this case, the Trust Fund incorporates herein Appendix A and Appendix B of PBGC's jurisdictional statement.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OREGON-WASHINGTON CARPENTERS-
EMPLOYERS PENSION TRUST FUND,

Appellant,

PENSION BENEFIT GUARANTY CORPORATION,

Appellant,

v.

R. A. GRAY & CO.

Appellee.

NOTICE OF OREGON-WASHINGTON CARPENTERS-
EMPLOYERS PENSION TRUST FUND OF APPEAL TO
THE SUPREME COURT OF THE UNITED STATES

FILED
JUN 20, 1983
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

NOTICE OF APPEAL

Notice is hereby given that Oregon-Washington Carpenters-Employers Pension Trust Fund appeals to the Supreme Court of the United States from the final judgment entered herein May 20, 1983.

This appeal is taken pursuant to 28 U.S.C. § 1252.

MILLER, NASH, YERKE, WIENER & HAGER

/S/

WILLIAM B. CROW

PAULL & BARNETT

DAVID S. PAULL

Attorneys for Oregon-Washington

Carpenters-Employers Pension Trust Fund

I hereby certify that on June 16, 1983, I served the foregoing Notice of Oregon-Washington Carpenters-Employers Pension Trust Fund of Appeals to the Supreme Court of the United States on:

MR. THOMAS M. TRIPLET
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*Of Attorneys for Pension Benefit
Guaranty Corporation*

by mailing to said persons full, true and correct copies thereof. I further certify that said copies were contained in sealed envelopes, addressed as above stated, and deposited in the post office at Portland, Oregon, on the 16th day of June, 1983, with postage thereon prepaid.

/S/

*Of Attorneys for Oregon-Washington
Carpenters-Employers Pension Trust Fund*

SEE COMPANION CASE

(SHOW)

PROCEEDINGS AND ORDERS

CASE NBR 83-1-00291 AFX
SHORT TITLE OR-WA Carpenters-Employers
VERSUS R. A. Gray & Co.

DOCKETED: Aug 19 1983

Date	Proceedings and Orders
Aug 19 1983	Statement as to jurisdiction filed.
Sep 15 1983	Motion of appellee R. A. Gray & Co. to affirm filed. VIDE.
Sep 21 1983	DISTRIBUTED. October 7, 1983
Sep 14 1983	Motion of G & R Roofing Company for leave to file a brief as amicus curiae in No. 83-245 filed.
Oct 11 1983	REDISTRIBUTED. October 14, 1983
Oct 17 1983	Motion of G & R Roofing Company for leave to file a brief as GRANTED.
Oct 17 1983	PROBABLE JURISDICTION NOTED. The case is consolidated with 83-245, and a total of one hour is allotted for oral argument. *****
Nov 3 1983	Record filed.
Nov 3 1983	Certified original record & C.A. proceedings, 9 volumes received.
Nov 23 1983	Order extending time to file brief of appellant on the merits until December 12, 1983.
Dec 12 1983	Joint appendix filed. VIDE.
Dec 12 1983	Brief of appellant Pension Benefit Guaranty Corporation filed. VIDE.
Dec 14 1983	Brief of appellant OR-WA Carpenters-Employers filed. VIDE.
Jan 10 1984	Motion of National-American Wholesale Grocers' Association for leave to file a brief as amicus curiae in No. 83-291 filed.
Jan 11 1984	Motion of Chamber of Commerce of the United States of America for leave to file a brief as amicus curiae in No. 83-291 filed.
Jan 11 1984	Motion of Transport Motor Express, Inc., et al. for leave to file a brief as amici curiae in No. 83-291 filed.
Jan 11 1984	Motion of G & R Roofing Company for leave to file a brief as amicus curiae in No. 83-291 filed.
Jan 11 1984	Brief of appellee R. A. Gray & Co. filed. VIDE.
Jan 11 1984	Motion of Sibley, Lindsay and Curr Company for leave to file a brief as amicus curiae in No. 83-291 filed.
Jan 11 1984	Motion of Republic Industries, Inc. for leave to file a brief as amicus curiae in No. 83-291 filed.
Jan 23 1984	Motion of National-American Wholesale Grocers' Association for leave to file a brief as amicus curiae in No. 83-291 GRANTED.
Jan 23 1984	Motion of Chamber of Commerce of the United States of America for leave to file a brief as amicus curiae in No. 83-291 GRANTED.

CONTINUE ()
(SHOW)

PROCEEDINGS AND ORDERS

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Jan 23 1984	Motion of Republic Industries, Inc. for leave to file a brief as amicus curiae in No. 83-291 GRANTED.
Mar 20 1984	SET FOR ARGUMENT. Monday, April 16, 1984. This case is consolidated with case No. 83-245. (1 hour)(1st case).
Mar 22 1984	Reply brief of appellant Pension Benefit Guar. Corp. filed. VIDED.
Mar 23 1984	Reply brief of appellant OR-WA Carpenters-Employers Pension Trust Fund filed. VIDED.
Mar 26 1984	CIRCULATED.
Apr 16 1984	ARGUED.